

Publication 146, *Sales to American Indians and Sales on Indian Reservations*
January 31, 2010 Written Comments Summary

The information below is a summary of the written comments received from tribal leaders and interested parties regarding suggested revisions to Publication 146, *Sales to American Indians and Sales on Indian Reservations*. The written comments received have been paraphrased and summarized by publication chapter for ease of review. Following each comment is a description of the action taken, and if no action taken, a reason as to why no action was taken. A copy of the original incoming written correspondence is attached following the summary of written comments.

From	Author	Representing	Date of Letter	Page #
Quesenberry	Stephen V. Quesenberry Karshmer & Associates 2150 Shattuck Ave, Suite 725 Berkeley, CA 94704	Moronggo Band of Mission Indians	January 29, 2010	12
Karuk	Sami Jo Difuntorum Karuk Tribe Housing Authority P O Box 1159 Happy Camp, CA 96039		January 12, 2010	15
Rincon	Bo Mazzetti Rincon Band of Luiseno Indians P O Box 68 Valley Center, CA 92028		January 29, 2010	19
Feldman	Glenn Feldman Mariscal, Weeks, McIntyre & Friedlander, P.A. 2901 N. Central Ave, Suite 200 Phoenix, AZ 85012	Santa Ynez, San Pasqual, and Cabazon Bands of Mission Indians	January 25, 2010	44
Ogas	Kathryn A. Ogas Tomaras & Ogas, LLP 10755-F Scripps Poway Parkway #281 San Diego, CA 92131	Lytton Rancheria of California	January 26, 2010	38
Smith River	Kara Miller Smith River Rancheria 140 Rowdy Creek Road Smith River, CA 95567		January 26, 2010	41
Rapport	David J. Rapport Rapport and Marston	Northern Circle Indian Housing Authority	January 7, 2010	44

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	P O Box 488 Ukiah, CA 95482			
Marston	Lester J. Marston Rapport and Marston P O Box 488 Ukiah, CA 95482	Chemehuevi Indian Tribe	January 6, 2010	47
Saunders	Allyson G. Saunders Holland & Knight 633 West Fifth Street Los Angeles, CA 90071	Un-named client	January 19, 2010	50
CO River	Eldred Enas Colorado River Indian Tribe 26600 Mohave Road Parker, AZ 85344		December 1, 2009	53
Campo	Monique LaChappa Campo Band of Mission Indians 36190 Church Road, Suite 1 Campo, CA 91906		November 23, 2009	56

Preface			
From	Summary of Comments	Action Taken	Reason
Quesenberry	PL 280 mentioned, but no reference to Supreme Court decision <i>Bryan v. Itasca County</i> which held that PL 280 did not grant to the States general civil regulatory jurisdiction, including taxing jurisdiction, over Indian tribes or tribal members on the reservation and did not waive tribal sovereign immunity.	Included suggested comments in Preface	
Karuk	Clarify that PL-280 does not grant any state taxation authority.	Included suggested comments in Preface	
Rincon	Clarify that PL-280 does not grant any state taxation authority and include information regarding the legal incidence of the tax and acknowledge the inherent authority of Indian tribes to tax and operate independent of local government regulation.	Information regarding PL 280 included in Preface. Legal incidence of tax and tribes authority to impose tax not added.	Legal incidence of tax and tribes authority to impose tax already included elsewhere in publication
CO River	PL 280 did not provide any grant of jurisdiction to the state with respect to taxation	Additional	PL 280 was

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	within Indian Country, therefore, PL 280 is not a pertinent law that applies to BOE and should be deleted.	information regarding PL 280 added to publication	included at the request of previous comments and is deemed relevant, so it was not removed.
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1. Key Definitions			
From	Summary of Comments	Action Taken	Reason
Quesenberry	Indian Organization: include in definition corporations formed under Section 17 of the Indian Reorganization Act and LLC formed under tribal law.	Clarification added regarding definition of Indian organization	
Quesenberry	Indian Reservation should be replaced by Indian country. Also, add definition of Indian country to Regulation 1616.	Indian country used throughout publication in place of reservation	No amendment to Regulation 1616 as that is beyond the scope of revising publication.
Quesenberry	Include statement indicating that tribal determination of who is included in an “Indian family” unit controls when a family member may not qualify as an Indian recognized by the Bureau of Indian Affairs.	None	Indian couple already defined
Karuk	Use Indian Country in lieu of reservation.	Indian country used throughout publication in place of reservation	
Karuk	Indian Organization include federally chartered Indian organizations formed under Section 17 of the Indian Reorganization Act.	Clarification added regarding definition of Indian organization	
Rincon	Definition of “Indian” should be broader to include either persons of American Indian decent or persons eligible to receive services as an Indian from the US Dept of Interior.	none	Regulatory change required

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Rincon	Indian Organization should include corporations organized under federal law and wholly-owned by Indians, tribally-chartered LLCs and partnerships not wholly owned by Indians.	Clarification added regarding definition of Indian organization. Other changes not included	Regulatory change required
Rincon	Definition of reservation “note” should be clarified to recognize the Tribe’s jurisdictional authority over reservation lands regardless of land tenure status so long as the land is within the exterior boundaries of the reservation.	Section in question re-written to clarify	
Rincon	Add fourth bullet to definition of reservation to include any land defined as Indian Country	Added definition of Indian country in lieu of reservation	
Feldman	Indian organization definition should include LLCs only if they are organized under tribal authority and all members are Indians.	Clarification added regarding definition of Indian organization	
Ogas	Clarify whether reservation includes rights-of-way, easements, or fee land within the boundaries of an Indian reservation.	Clarification added in definition of Indian country	
Smith River	Add definition for “exemption certificate”	Definition added	
Smith River	Add definition of an “Indian Purchaser” which includes Indians, Indian couples, Indian organizations. Use Indian Purchaser throughout document.	Definition added and reference to Indian purchaser made throughout document	
Smith River	Indian organization definition should include Indian couples as members or partners and corporations that are state and/or federally chartered corporations organized by Indian tribes and/or individual Indians.	none	Regulatory change required
Rapport	Indian Organization should address other types of tribal organizations beyond corporations and partnerships.	Clarification added regarding definition of Indian organization	

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Marston	Definition of Indian Organization should be modified to include federally chartered corporations organized under Title 25 of the United States Code section 477.	Clarification added regarding definition of Indian organization	
Marston	Definition of reservation should include “all Indian country as defined by Title 18 of the United States Code section 1151.”	Clarification added in definition of Indian country	
Marston	Page 8, “Preface” should be “Preference”. Also, clarify that Indian seller on reservation does not need a seller’s permit.	none	Information regarding need for permit already included (following paragraph)
Marston	Page 8, “use tax” should clarify that purchase of a vehicle from out of state by an Indian who resides on reservation is not subject to use tax.	none	Inclusion of application of tax to specific transactions not included in definitions
CO River	Use of “non-trust” land or define “Indian reservation” by reference to federal law.	Clarification added in definition of Indian country	
CO River	Indian organization definition should be clearer to indicate in includes Indian tribes.	none	Already included in first sentence of definition
Campo	Indian Organization definition should include corporations organized under federal authority.	none	Regulatory change required

2. Sales to Indians: Retailers Located Outside Indian Country

From	Summary of Comments	Action Taken	Reason
Ogas	Clarify whether risk of loss during shipment equates transfer of ownership.	Clarification added in Chapter 5	
Rapport	Pub requires Indian to reside on reservation. Clarify “residency” for Indian organizations.	Clarification added	

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Campo	Delete reference throughout document to use of property off-reservation more than one-half of the time during the first 12-months of ownership as any use tax applied to personal property that is used off-reservation with the first 12-months of purchase is an impermissible tax in violation of Regulation 1616(d).	none	Regulatory change required
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3. Sales by Retailers Located in Indian Country			
From	Summary of Comments	Action Taken	Reason
Quesenberry	CA lacks jurisdiction to require tribal or individual Indian retailer on the reservation to obtain a seller's permit.	none	Already included
Ogas	Responsibility for collection of use tax should never be on the seller. However, in the event it is the responsibility of the seller to collect use tax, clarify that where the purchaser is a tribal entity and the merchandise is delivered on the reservation, the property is presumed for use on the reservation. Clarification is also needed regarding how the seller is expected to determine use of the property on or off the reservation at the time of sale.	none	Indian purchaser that issues a valid exemption certificate addresses the issue of use of property in Indian country
Marston	Page 12, "permit requirements" replace period at end of sentence with comma and "unless your business is located on the reservation and you are an Indian residing on your reservation."	none	Information already included in current language (following paragraph)
Marston	Page 14, "Tribal Taxes" replace second sentence with "the amount of tribal tax should not be included in the retail selling price of the product being sold for the purpose of determining the amount of California sales or use tax when the following apply." Also, delete second sentence in second bullet point.	none	Current language is adequate, deleting second sentence in second bullet would be inconsistent with statute.
Marston	Federally licensed Indian trader does not need a seller's permit to make sales to Indian tribes or Indians on their respective reservation.	Clarification added	

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CO River	Information fails to address need for retailers on Indian reservations to obtain all necessary tribal licenses and comply with applicable tribal tax laws.	Reference to tribal licenses and tribal laws added	
Campo	For sales by on-reservation retailers to non-Indians or Indians not residing on a reservation, assertion of a use tax violates the right of tribal government to assert exclusive control over retail affairs on the reservation and contributes to the on-going problem of dual taxation on reservation retailers. Rather than attempting to assert a use tax in lieu of a sales tax on reservation retailers, BOE should consider initiating discussions with tribes about tribal-state cooperative tax agreements/compacts.	none	Regulatory change required. BOE does not have the authority to enter into compacts with tribes

4. Purchases by Indians

From	Summary of Comments	Action Taken	Reason
	No comments received		

5. Documenting Exempt Transactions

From	Summary of Comments	Action Taken	Reason
Quesenberry	Definition of Indian does not control in situations where the purchase is made on behalf of an Indian family.	none	Issue addressed in definition of Indian couple. Any further changes would require regulatory change
Quesenberry	In lieu of notary public or tribal official, allow a duly authorized tribal employee to acknowledge the on reservation receipt of construction materials.	Reference added to "tribal official or designee"	
Karuk	Remove the notary public section from BOE-146-RES or revise third paragraph on p. 18 to clarify that any tribal representative authorized by tribe to document deliveries may act in the capacity of notary public and that receipt of delivery provided by common carrier is sufficient to document delivery on reservation.	Reference added to "tribal official or designee"	

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Karuk	Include sample exemption certificate specific for construction contracts and clarify that one certificate only is necessary for all construction material purchases by a tribe from a contractor.	New exemption certificate, BOE-146-CC, added	
Rincon	Include “sale on approval” as transfer of title on reservation when delivered by common carrier.	None	Duplicative of information already included
Rincon	Include specific exemption certificate for construction contracts (sample provided)	New exemption certificate, BOE-146-CC, added	
Feldman	Clarify that notarization of the form is not required. Also, documentation may be done by a duly authorized tribal representative.	Reference added to “tribal official or designee”	
Smith River	Include description of acceptable documents when sales made to Indian couple.	Clarification added	
Smith River	Law requires seller to obtain satisfactory evidence that the sale is exempt from tax. Since law does not require the statement be notarized, remove notary statement from exemption certificate and text of publication.	none	Notarization of delivery statement is recommended as a method of documenting delivery in Indian country
Smith River	Section titled “for individuals” at top of page 19 should include “and/or Indian couples”.	Suggestion included	
Smith River	Delivery to a P O Box should not preclude the tax-exempt status of the transaction provided the property is purchased for use on reservation by an Indian purchaser.	none	Statutory change required
Marston	Page 17, add third requirement regarding delivery of property “3. By a designated agent of the seller where both the seller and his agent executed declaration under penalty of perjury that the seller appointed the agent as his agent and the agent delivered the vehicle to the Indian on the reservation with the intent that title to the vehicle pass upon delivery.”	none	Example too specific and duplicative of current requirements already provided

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6. Sales Related to Construction Contracts			
From	Summary of Comments	Action Taken	Reason
Karuk	Include at the end of second to last paragraph a sentence regarding guaranteed maximum price contracts.	Information regarding guaranteed maximum price contracts added	
Karuk	Remove first bullet regarding a contractor must be in the business of selling materials or clarify that a contractor that obtains a seller's permit is treated as being in the business of selling materials.	Clarification added	
Rincon	Delete first bullet indicating contractor must be in business of selling materials or other TPP.	Clarification added	
Rincon	Include information regarding construction contracts with Indians in Publication 9.	none	Publication 9 is currently under revision and reference to Publication 146 is to be added rather than including information from Publication 146 in Publication 9
Rincon	Include sample language for contracts (language provided)	Sample contract language included	
Feldman	First bullet, clarify that the contractor must be in the business of selling materials for the purposes of the contract in question.	Clarification added	
Ogas	Does delivery of materials within an easement, rights-of-way, or fee land within the boundaries of a reservation qualify as delivery on a reservation?	Clarification added to definition of Indian country	

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Ogas	Clarify who may accept delivery of materials on the reservation (construction contractor, tribal member). Does a tribe need to appoint somebody as its agent for delivery, and if so, how formal must an agreement be?	none	Acceptance of delivery is generally irrelevant in determining whether tax applies
Ogas	Clarify that as long as contractor holds a seller's permit the contractor will be regarded as being in the business of selling materials.	Clarification added	
Saunders	Proposed contractual provisions provided for use primarily with guaranteed maximum price contracts.	Sample contract language included	
Campo	Include information regarding proper use of resale certificates between prime contractors and sub-contractors.	Information regarding use of resale certificates added	

7. Special Taxes and Fees			
From	Summary of Comments	Action Taken	Reason
Rincon	Clarify whether BIA roads are part of "state or local road system. Rather than provide for taxing all fuel sales to Indian country and refunding the tax, state and tribes should explore entering into compacts that recognize the Tribes authority to impose a tax and use the proceeds to fund governmental services. This could also apply to the imposition and collection of excise and cigarette taxes by the BOE.	Clarification added regarding BIA roads.	BOE lacks authority to enter into compacts with tribes
Marston	Page 24, add paragraph explaining that if the sale is from an out of state retailer directly to a tribe, who then sells the fuel to a member of the tribe residing on the reservation, that the transaction is exempt from the state motor vehicle fuel tax.	none	Statutory change required
Campo	BOE should explore entering into cooperative tax agreements/compacts.	none	BOE lacks authority to enter into compacts with tribes

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8. For More Information			
From	Summary of Comments	Action Taken	Reason
	No comments received		

9. Table: Proper Application of Tax			
From	Summary of Comments	Action Taken	Reason
Smith River	“Purchaser” should be amended to read “Indian Purchaser”.	none	“Purchaser” is intentionally generic since it may refer to Indian purchaser or non-Indian purchaser

10. Statement of Delivery on a Reservation (Exemption Certificate)			
From	Summary of Comments	Action Taken	Reason
	Comments received are summarized under “5. Documenting Exempt Transactions”		

KARSHMER & ASSOCIATES (P.C.)

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January 29, 2010

**Via Facsimile (916-322-0187) and
Email (Brad.Miller@boe.ca.gov)**

Bradley Miller
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Re: Comments on Revised BOE Publication 146

Dear Mr. Miller:

The following comments are submitted on behalf of the Morongo Band of Mission Indians ("Morongo") in response to the revised draft of Board of Equalization ("BOE") Publication 146 that was the subject of discussion at the meeting in Sacramento on December 3, 2009. The revised draft took into consideration the discussions at meetings held in December 2008 and January and August 2009, as well as written comments submitted by the California tribes, including Morongo.

Generally, the revised draft is better organized than the original draft and clarifies the specific tax exemptions and documentation issues regarding on-reservation transactions with Indians and with non-Indians and Indians who do not reside on a reservation. The BOE stated that this draft will be revised further based on the December 3rd meeting discussion and any additional written comments received by BOE, and that another meeting would be held in the Spring or Summer 2010 to review what should then be a final draft.

- **Case Law Regarding Indian Tax Issues**

Comments on the original draft of Pub 146 criticized the lack of any reference to the major legal decisions governing state taxation of Indians and on-reservation transactions. There also was criticism of the draft's failure to mention Public Law 280. In the revised draft, the BOE provided a compilation of some of the major Supreme Court Indian tax decisions. It also mentioned Public Law 280 but made no reference to the Supreme Court decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976), which interpreted Public Law 280. *Bryan* held that Public Law 280 did *not* grant to the States general civil regulatory jurisdiction, including taxing jurisdiction, over Indian tribes or tribal members on the reservation and did not waive tribal sovereign immunity. Because of the significance of *Bryan* as the definitive Supreme Court interpretation of Public Law 280 and the general framework it provides for the

interpretation of state assertions of taxing and regulatory jurisdiction on Indian reservations, Morongo recommends that it be included in the cases cited in the Preface to Publication 146.

- **Definitions**

- Indian Organization

- A number of tribes commented on the need to include corporations formed under Section 17 of the Indian Reorganization Act, 25 U.S.C. § 477, and limited liability corporations formed under tribal law, as “Indian organizations” for California sales and use tax purposes. Morongo recommends that the BOE accept this suggestion and revise Publication 146 accordingly.

- Indian Reservation

- There was discussion at the December 3rd meeting whether the term “Indian country” should be used in place of the term “Indian reservation” because Indian country is a more inclusive term and more accurately reflects the territorial scope of the Supreme Court’s Indian tax decisions. The BOE appeared to agree with the comment and indicated that it would address this issue in the next revision of Publication 146. Morongo supports the suggested revision and also notes that it also may be necessary for BOE to include the definition of “Indian country” in Regulation 1616, noting that it is a more precise and inclusive term than “Indian reservation.”

- **Non-Indian Family Members**

- The BOE staff indicated that tribes have the discretion to determine who would be entitled to claim the exemption from tax as a member of an Indian family, especially with respect to the purchase of goods from on-reservation retailers. For example, if the child of a couple consisting of an Indian and non-Indian who reside on a reservation purchases items for the family at a store on the reservation, even though the child might not qualify as an Indian recognized by the Bureau of Indian Affairs, as long as the Tribe recognizes the child as part of the Indian couple’s family unit, the sale to the child should be tax-exempt. Morongo recommends that Publication 146 include a statement acknowledging that a tribal determination of who is included in the “Indian family” unit controls under these circumstances if questions should arise regarding the tax-exempt nature of the sale.

- **Construction Contracts**

- In the revised draft, the BOE staff has indicated considerable flexibility in the form of contracts used by Indian tribes for on-reservation construction projects. Discussion with the BOE of the tax consequences of on-reservation construction projects has focused on the underlying premise that the contract documents must establish that the Tribe (not the general contractor) is the consumer of the construction materials and that the Tribe (not the general contractor) gets the benefit of the price reduction of the materials as a result of the Indian tax exemption. Morongo agrees with this flexible

approach because it allows the contract documents to take different forms as long as the underlying basis of the Indian tax exemption is properly documented.

- **Documentary Evidence**

For tax-exempt sales to individual Indians, there must be evidence that the sale occurred on a reservation, that the purchaser is an Indian, and that the purchaser resides on an Indian reservation (does not have to be the reservation on which the sale occurs). Regulation 1616 provides that an "Indian" is "any person of Indian descent who is entitled to receive services as an Indian from the United States Department of the Interior." It should be made clear in Publication 146 that this definition of Indian does not control in situations where the purchase is being made on behalf of an Indian family that consists of both Indian and non-Indian members and that the Tribal Council has discretion to determine who is a member of that Indian family.

With regard to on-reservation construction projects and documentation of delivery of project materials to the reservation, many of the comments focused on form BOE-146-RES (Back) (Statement of Delivery on a Reservation) because it includes a notary statement to be completed by either a Notary Public or a tribal official. There were a number of comments questioning the practicality of having a notary public or tribal official standing around a construction site awaiting delivery of materials and that a tribe's designation of a particular employee for this purpose should be sufficient. Morongo recommends a revision of the form to allow a duly authorized tribal employee to acknowledge the on-reservation receipt of construction materials.

- **Seller's Permits**

The revised draft of Pub 146 states that a retailer, including an Indian retailer located on a reservation, must obtain a California Seller's Permit "even when most or all of [the] sales are not taxable, or qualify as exempt." A number of comments were made to the effect that California has no jurisdiction to require a tribal or individual Indian retailer on the reservation to obtain a Seller's Permit. Morongo agrees with these comments, which are consistent with the position Morongo has taken with regard to sales made at tribal enterprises on the Morongo Reservation.

Morongo appreciates the constructive dialogue on these important tax issues and the opportunity to submit comments on the revised draft of Publication 146. The Tribe looks forward to continuing its participation in the revision process.

Sincerely,
KARSHMER & ASSOCIATES


Stephen V. Quesenberry

Cc: Morongo Tribal Council

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January 12, 2010

Mr. Jeffrey L. McGuire, Chief
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Re: *Comments on the Revised Draft of Publication 146*

Dear Mr. McGuire,

In response to your letter to Tribal Leaders and Interested Parties, dated November 13, 2008, the Karuk Tribe Housing Authority (KTHA) is submitting comments regarding the revised draft of Publication 146, *Sales to American Indians and Sales on Indian Reservations*. The KTHA submitted written comments on July 31, 2009, in response to the initial invitation for comments regarding the August 2008 version of Publication 146, and we had a representative attend the meetings on August 19, 2009 and December 3, 2009. Again, we appreciate the attention the State Board of Equalization (BOE) is giving to Publication 146 and the effort the BOE is making to work with Indian tribes located within the state.

The revised draft of Publication 146 includes a number of organizational changes and new language intended to clarify the guidance and address several specific issues the KTHA and others raised in the previous round of comments and the August 19 meeting. While these changes are helpful, we are pleased to have the opportunity to provide comments on certain issues that we do not feel have not been adequately resolved. The KTHA is an Indian housing authority formed under tribal law and in accordance with the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), and we limit these comments to four areas, which are of particular interest to the KTHA: (1) construction contracts and the requirements for the treatment of a contractor as a retailer of construction materials; (2) documentation to support claimed exempt sales to Indian organizations and persons on an Indian reservation; (3) key definitions; and (4) clarification of the preface.

Construction Contracts

In our July 31 letter, we explained that the federal regulations governing the implementation of NAHASDA severely limit the use of "time-and-material" construction

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contracts. These regulations provide that such contracts may only be used "(i) after a determination that no other contract is suitable, and (ii) if the contract includes a ceiling price that the contractor exceeds at its own risk." 24 C.F.R. § 85.36(b)(10). We requested that Publication 146 be amended to clarify that a time-and-material contract need not be used in order to have a contractor treated as a retailer of construction materials, provided the construction contract separately state the price of materials, exclusive of the charge for installation and the contract provides for the transfer of ownership of the materials prior to installation of the materials. We are pleased that the BOE has inserted two new paragraphs to the end of Section 6 of the revised draft publication ("Sales Related to Construction Contracts"), which expressly clarify that a time-and-material contract is not required and that "[a]ny other type of contract may be used provided the contract contains a separately stated selling price of the materials" . . . and "sufficient language transferring title of the materials. . ." Revised Draft Publication 146, p. 23.

In his November 13 letter, Mr. McGuire noted that specific contract examples have not been cited and he encouraged the submission of specific contract examples to be considered for inclusion in the revised publication. We propose that the revised draft Publication 146 be amended to include the following sentence at the end of the second to last paragraph of Section 6:

"For example, a guaranteed maximum price contract or a contract in which the labor costs are provided in a lump sum may be used, provided the selling price for the materials is stated separately and apart from the labor costs, and the contract provides for the transfer of the title of the materials to the Indian customer prior to their installation."

Additionally, the revised draft Publication 146 includes a new example under the heading "Sales to non-Indian contractors" (see, p. 22), which clarifies that a construction contractor who does not generally make over the counter sales of materials and does not hold a seller's permit, "may obtain a seller's permit and act as a retailer of the materials, provided all of the requirements listed above are met." This new example is intended to clarify that a contractor, who obtains a seller's permit, may be treated as a retailer of construction materials even if the contractor does not regularly sell such materials. However, the revised Publication retains, as the first requirement, a bullet point that requires the contractor to be in the business of selling materials or other tangible personal property. To avoid confusion, we suggest that this first bullet point be stricken. If not stricken, it will be necessary to clarify that the contractor described in the example would meet this requirement, and we suggest that the third sentence of the second paragraph under the subheading "Construction contractor as retailer of materials" be revised as indicated below:

"If such a construction contractor wishes to enter into a construction contract with an Indian on an Indian reservation to furnish and install materials, the construction contractor may obtain a seller's permit, and in which case the

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contractor will be treated as being in the business of selling materials and may act as a retailer of the materials, provided all the requirements listed above are met”

Documentation of Exempt Transactions

The KTHA and others commented on the suggestion that certification by a notary public is needed to document delivery of property on the reservation. Section 5 of the revised draft Publication recognizes the difficulty of securing the services of a notary public to document deliveries of property on the reservation, but BOE-146-RES, *State of Delivery on a Reservation*, still retains a section that may be completed by a notary public (see revised draft Publication 146, p. 18). Although the revised draft provides that a tribal council officer may act in the capacity of a notary public for the purposes of documenting a delivery on reservation, this requirement remains overly burdensome and exceeds the regulatory requirements, and we request that the notary public section of form BOE-146-RES be dropped altogether.

BOE-146-RES requires that the person making the delivery identify the seller and the delivery address, and certify, under penalty of perjury, that the delivery of the property was made on the reservation. This certification is sufficient to document an on-reservation delivery, and there is no need to require that the delivery person and the Indian purchaser jointly appear before a notary public to certify that they executed the form document. Furthermore, such a requirement assumes that deliveries will be made in a manner that will allow the Indian purchaser to arrange for the services of a notary public or tribal council officer to be available at the time of delivery. Deliveries, especially those made by common carrier or contract carrier, are simply not scheduled in such a manner.

If the notary public section is not dropped completely, we request that the third full paragraph on page 18 of the revised draft be amended as indicated below to clarify (1) that any tribal representative authorized by the tribe to document deliveries may act in the capacity of a notary public to certify the form BOE-146-RES and (2) that the receipt of delivery provided by a common carrier or contract carrier, which shows the delivery location and date, is sufficient to document delivery on reservation.

“If a state-licensed notary public is not readily available to document delivery of the property on the reservation, please note that many tribes have tribal council officers who may act in the capacity of notary public for the purpose of documenting delivery on the reservation. Certification of delivery on the reservation by a tribal representative, authorized by the tribe to document such deliveries, council officer is acceptable. When a delivery is made by a common carrier (UPS, FedEx, etc.) or a contract carrier (a shipping, trucking, or transport company) the receipt of delivery provided by the common carrier or contract carrier, which shows the delivery location and date, is acceptable to document delivery on reservation.”

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In addition to the issues regarding the Statement of Delivery form, the sample Exemption Certificate is not well suited to construction contracts. During the December 3 meeting, staff for the BOE agreed that it would be helpful to provide a sample Exemption Certificate tailored specifically for construction contracts. We agree that it would be helpful to provide a sample Exemption Certificate for construction contracts and urge that it clarify that one Exemption Certificate can be used for all construction materials purchased by a tribe or Indian organization from the general contractor, or his subcontractors. If all the purchases are made by the same tribe or Indian organization, there is no purpose served by requiring a separate certificate for the purchase of construction materials.

Key Definitions

To avoid confusion, we suggest that the term "Indian Country," as defined in 18 U.S.C. § 1151, be used instead of the term "Reservation." We understand that it is the intent of the BOE to be consistent with federal law, and although the definition of "Reservation" tracks the definition of Indian Country in many respects, use of the term "Indian Country" is more accurate and is consistent with the applicable federal law. We also agree with the suggestion, made during the December 3 meeting, that the definition of the term "Indian Organization" be modified to also include federally chartered Indian organizations formed under Section 17 of the Indian Reorganization Act.

Preface

The revised Preface section includes a reference to Public Law 83-280. The Supreme Court has ruled that Public Law 280 did not authorize Public Law 280 states to impose taxes, and during the December 3 meeting, staff from the BOE clarified the Board's position that Public Law 280 does not grant any State taxation authority. We urge that this reference to Public Law 280 be clarified to state that it does not grant any State taxation authority.

Conclusion

We appreciate your invitation to comment on the revised draft to Publication 146, and we look forward to continuing to work with the BOE through the completion of the revision process. If you have any questions regarding our comments or would like additional information, please contact our legal counsel, Tim Seward, by telephone at (916) 442-9444 or by email at tseward@hobbsstrauss.com.

Sincerely,



Sami Jo Difuntorum
Executive Director

Rincon Band of Luiseño Indians

PO Box 68 Valley Center, CA 92028 ♦ (760) 749-1051 ♦ Fax: (760) 749-8901



Mr. Bradley Miller
 Tax Policy Division
 Board of Equalization
 P O Box 942879
 Sacramento, CA 94279-0044
 Fax 916-322-0187
Brad.Miller@boe.ca.gov

January 29, 2010

Comments of Rincon Band of Luiseno Indians Regarding Board of Equalization Pending Draft Revision of Publication 146: Sales to American Indians and Sales on Indian Reservations¹

Dear Mr. Miller,

The Rincon Band of Luiseno Indians submits this as its formal response to the BOE's letter dated November 13, 2009. The following comments address specific sections of the Pending Draft Revisions to Publication 146 ("Draft"):

1. Preface

¹ The Rincon Band continues to have a number of disagreements with the State regarding taxation policy and interpretation of cases regarding the incidence and applicability of state taxes. In submitting these comments and participating in this process, the comments of the Rincon Band of Luiseno Indians should neither be construed to bind the Band to any position that concedes state authority to any tax in any context nor should they be considered a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands. Further, the comments shall not in any way be interpreted as acquiescence to or agreement with the revised Draft, nor in any way be interpreted as a waiver of the Tribe to contest any position the State may take regarding applicability of state or local taxes to Indian lands, Indian enterprises, or goods and services provided on Indian lands.

Rincon Band of Luiseno Indians
 BOE Publication 146 Comments
 January 29, 2010
 Page 1 of 9

Bo Mazzetti
 Chairman

Stephanie Spencer
 Vice-Chairwoman

Charlie Kolb
 Council Member

Steve Stallings
 Council Member

Kenneth Kolb
 Council Member

Publication 146 is intended as a guide for how the State of California handles the taxation of sales to Indians within the state as well as sales by entities (Indian and non-Indian) conducting business on a reservation, Rancheria or Indian trust lands. At the Interested Parties meeting on December 3, 2009, in Sacramento (the "Meeting"), BOE agreed to revise the Preface to characterize the basic principles of law that restrict state authority to tax Indians or Indian commerce on reservations as a "limitation" of state authority.

The Preface provides "[i]n administering the Sales and Use Tax Law in a fair and uniform manner, the BOE is subject to all pertinent laws and regulations, including Public Law 83-280, the provisions of the California Revenue and Taxation Code, and opinions issued by the federal courts in *Moe v. The Confederated Salish and Kootenai Tribes of the Flathead Reservation* (1976) 425 U.S. 463, 48 L.Ed.2d 96, *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) 447 U.S. 134, 65 L.Ed.2d 10, *Oklahoma Tax Commission v. Chickasaw Nation* (1995) 515 U.S. 450, 132 L.Ed.2d 400, *Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1994) 37 F.3d 430, and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma* (1991) 498 U.S. 505, 112 L.Ed.2d 1112."

The revised Preface should begin with the premise that Public Law 83-280 expressly disclaims authorizing state taxation of any real or personal trust property belonging to any Indian or any Indian tribe² and denies states any authority to regulate the use or development of any real or personal trust property belonging to any Indian or Indian tribe.³ The Supreme Court has limited its application to confer state jurisdiction

² P.L. 280, 28 U.S.C. § 1360(b) "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership of right to possession of such property or any interest therein."

³ 25 C.F.R. § 1.4 - State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

over private civil litigation involving reservation Indians such that it does not constitute a grant of general civil regulatory authority.⁴

The Preface should also introduce the reader to the concepts regarding the legal incidence of the tax and preemption and acknowledge the inherent authority of Indian tribes to tax and operate independent of local government regulation.⁵

2. Key Definitions

“Indian”

The definition of “Indian” person should be broader so that either persons of American Indian descent or persons eligible to receive services as an Indian from the United States Department of the Interior fall within the definition. The requirement that an “Indian” person be both a descendant and eligible to receive services excludes Indian persons who are lineal descendants residing on reservations but not eligible to receive services from the United States of the Interior. We suggest the following revisions to this definition:

For California sales and use tax purposes, an “Indian” is a person who is ~~both~~ either of the following:

- An individual of American Indian descent, ~~and or~~
- Eligible to receive services as an Indian from the United States Department of the Interior.

“Indian organization”

In Rincon’s comments submitted to you, July 31, 2009, a copy of which is attached to this letter for your reference, the Band stated that “[t]he first paragraph of the

⁴ Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1257 (9th Cir.1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977).

⁵ To the extent any portion of the taxes imposed and collected are earmarked for local districts and counties, the taxes violate federal law. The Ninth Circuit has refused to extend P.L. 280 jurisdiction to local governments. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 661 (9th Cir.1975), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977). Accord United States v. County of Humboldt, 615 F.2d 1260 (9th Cir.1980). In Santa Rosa, the Ninth Circuit stated that Congress’ apparent intent in enacting P.L. 280 was to “make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered ... to regulate matters of local concern within the area of its jurisdiction.” Santa Rosa, 532 F.2d at 663.

term “Indian Organization” provides ‘[c]orporations qualify as Indian organizations only if they are organized under tribal authority and wholly-owned by Indians.’ This definition is incomplete. Corporations organized under federal law and wholly-owned by Indian tribes also qualify as ‘Indian Organizations’ as that term is defined. In addition, there is no legal basis to broadly exclude tribally-chartered LLCs and partnerships not wholly-owned by Indians from qualifying for exemptions to the extent of the Indian ownership interest in these entities for activities conducted on a reservation.”

At the Meeting, BOE representatives appeared entirely unaware of the Band’s attached written comments on this exact definition. BOE staff responded as if this issue was being raised for the very first time. Section 17 corporations organized under federal law, 25 U.S.C. § 477, are wholly-owned by tribes and should be included within the definition of “Indian organization.” The Sales and Use Tax Regulation, 1616(d)(2) expressly “excludes corporations, and other corporations wholly owned by Indians” from the definition of Indian organization. States are prohibited by federal law from regulating Indian tribes, including corporations organized under 25 U.S.C. § 477, in a manner that is inconsistent with any federal statute or regulations.⁶ To the extent Cal. Reg. 1616(d)(2) excludes corporations organized under 25 U.S.C. § 477 such that sales and use tax could apply, it violates federal law. In addition, this definition should also recognize *any other legal entity created by a tribe* pursuant to tribal law even if a proportionate interest in the entity is held by non-Indian persons or entities (e.g., limited liability companies or partnerships). There are several instances where federal law recognizes Indian-owned and controlled corporate entities as legally established Indian organizations.⁷ Please consult the attached record and revise the Draft accordingly.

“Reservation”

In Rincon’s attached comments submitted to you, July 31, 2009, the following comment was included about the Note: “[t]he note is not particularly helpful because if the land is within the boundaries of a reservation state tax law does not apply. What is the purpose of focusing on a gaming facility? Does your analysis change if the delivery is made to the purchasing department which is part of the gaming facility and then affixed to a structure in the adjacent parking lot?”

⁶ P.L. 280, 28 U.S.C. § 1360(b).

⁷ Sec. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b (1), 25 C.F.R. § 900.6 - “*Tribal organization* means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body....” ; Buy Indian Act, 35 Stat. 71, as amended, 25 U.S.C. § 47, 25 C.F.R. 370.502 - “*Indian firm* means a sole enterprise, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians”

The Draft restates the August 2008 Publication verbatim and provides, “[p]lease note: Not all portions of a facility housing an Indian gaming establishment may be located on ‘land held by the United States in trust for any Indian tribe or Indian individual.’ Some portions of a facility containing a gaming establishment (for example, a parking lot) may be located on non-reservation land and transactions that occur there may not meet the exemption requirements.”

Indian tribes assert civil regulatory jurisdiction over fee lands and non-members within the exterior boundaries of their reservations.⁸ If the parking lot referred in the “Note” is within the exterior boundaries of the reservation, it would be considered part of the reservation and, therefore, subject to tribal, not state, jurisdiction. The “Note” would be less confusing if it were revised to recognize the Tribe’s jurisdictional authority over Reservation lands regardless of land tenure status so long as the land is within the exterior boundaries of the reservation.

In addition, this definition needs a fourth bullet point added to the existing description of a Reservation which would include any land defined as “Indian Country” pursuant to 18 U.S.C. § 1151.⁹ The Indian Country statute includes formal and informal lands that, whether restricted or held in trust, are set apart for the residence of Indians and subject to federal protection and supervision.

3. Documenting Exempt Transactions

Transfer of title (ownership) on the reservation

This section should include commercially-licensed vehicles and a third bullet to add delivery transactions involving “sale on approval” under Cal. Comm. Code § 2327 (1)(a) and (b), as another means by which title passes upon delivery and acceptance on a Reservation.¹⁰ The revised section would read as follows:

⁸ *Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

⁹ 18 U.S.C. § 1151 provides: “[e]xcept as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

¹⁰ Cal. Comm. Code §2327 provides: “(1) Under sale on approval unless otherwise agreed (a) Although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and (b) Use of the goods consistent with the

In addition, retailers must generally deliver the product by:

1. Using the retailer's vehicle or commercially licensed vehicles, or
2. By mail, common carrier (UPS, FedEx, etc.), or contract carrier (a shipping, trucking or transport company), when both of the following requirements are met:
 - The contract of sale or sales invoice includes a statement specifically requiring delivery on the reservation (for example, F.O.B. name of Indian reservation or "sale on approval") and providing that title passes upon delivery on the reservation, and
 - The goods are in fact delivered on the Indian reservation.

6. Sales Related to Construction Contracts

Construction contractor as retailer of materials

This section of the Draft sets forth the requirements for a contractor to be treated as a retailer for purposes of selling materials exempt from tax. The Band suggests deleting the first bullet that "[t]he contractor must be in the business of selling materials or other tangible personal property" because it is extraneous and incorporated into the representations contractors provide to obtain a permit in the BOE Seller's Permit Application. This is also confusing because it implies a volume threshold for selling instead of facilitating an understanding, on behalf of construction contractors, that for purposes of a particular construction project with an Indian tribe, the contractor is in the business of selling materials tax exempt to the tribe. In addition, we believe it would also be helpful to incorporate the prohibition set forth in *BOE Publication 9, Tax Tips for Construction and Building Contractors*, that instructs contractors about the appropriate use of resale certificates. If accepted, these revisions to the Draft would be as follows:

- ~~The contractor must be in the business of selling materials or other tangible personal property.~~
- The contractor must possess a valid seller's permit.

purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole."

- The construction contract must explicitly provide for the transfer of title to the materials prior to the time the materials are installed, and must separately state the sales price of materials, exclusive of the charges for installation (for example, a time-and-materials contract).
- The construction contractor must provide a valid and timely resale certificate only to its vendor, contractors are prohibited from accepting resale certificates from prime contractors.

Tax-exempt sales of materials under a construction contract

The exemption certificate set forth in the Draft addresses non-construction purposes only. It would be helpful if BOE also provided a sample exemption certificate that could be used specifically with construction contracts. Generally, the larger project the greater the number of material orders and deliveries. Rincon proposes the exemption certificate below for your consideration as a sample for tribes and contractors to use in documenting exempt sales under a construction contract.

EXEMPTION CERTIFICATE

**RINCON BAND OF LUISENO INDIANS
SALES TAX EXEMPTION CERTIFICATE**

DATE: January 10, 2010

PURCHASER: Rincon Band of Luiseno Indians
PO Box 68
Valley Center, CA 92082

SELLER'S PERMIT NO.: CA0012345

PROPERTY PURCHASED: Chapel Construction Contract, dated January 10, 2010

PURPOSE: Permanent on-reservation improvements

This Certificate documents an exempt sale to Indian purchaser with delivery on Rincon Indian Reservation to purchaser under the provisions of Sales and Use Tax Regulations 1616. When accepted in good faith, this exemption certificate may be used for the purchase of construction materials pursuant to the above-referenced construction contract, provided receipts are attached such that a reasonable description of the materials purchased is described.

By: _____

Its: _____

With respect to construction contract language, BOE representatives requested examples of contract language to illustrate the proper application of tax, with regard to transactions involving construction contracts. Below are a few examples of contract provisions for your consideration.¹¹

SECTION 1.0. Contract Price. Subject to the terms and conditions hereof, as payment for Contractor's performance of the Services under this Agreement, Tribe shall pay the total sum of \$ _____ ("Contract Price"). The portion of the Contract Price which is the total estimated costs of materials only is \$ _____, which amount is exclusive of any charge for installation and performance of labor Services.

SECTION 1.0. Contract Price. Subject to the terms and conditions hereof, as payment for Contractor's performance of the Services under this Agreement, Rincon shall pay the total not to exceed sum of \$ _____ ("Contract Price"). The portion of the Contract Price which is the total not-to-exceed cost of materials only is \$ _____, which amount is exclusive of any charge for installation and performance of labor Services.

SECTION 1.0. Contract Price. Subject to the terms and conditions hereof, as payment for Contractor's performance of the Services under this Agreement, Rincon shall pay the a guaranteed maximum cost of \$ _____ ("Contract Price"). The portion of the Contract Price which is the guaranteed maximum cost of materials only is \$ _____, which amount is exclusive of any charge for installation and performance of labor Services.

In addition, for construction contracts where the Indian tribe transacts all materials purchases, via purchase orders placed directly with a vendor, such that no materials are procured and delivered by a contractor, the relevant contract provision would provide as follows:

SECTION 1.0. Contract Price. Subject to the terms and conditions hereof, as payment for Contractor's performance of the Services under this Agreement, Rincon shall pay the total lump sum of \$ _____ ("Contract Price") for installation services

¹¹ TIME AND MATERIAL CONTRACT. "Time and material contract" means a contract under which the contractor agrees to furnish and install materials or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication. Cal. Reg. §1521(a)(7).

which amount is for labor only and exclusive of any furnishing or charge for materials in connection with the project.

7. Special Taxes and Fees

BOE should clarify whether BIA roads are part of "a state or local road system". Rather than provide for taxing all fuel sales to Indian country and providing a mechanism for refunding the tax, the State and the Tribes should explore entering into compacts that recognize the Tribes authority to impose a tax and use the proceeds to fund governmental services or to improve reservation infrastructure along the lines that other tribes and states have done.

This could also apply to the imposition and collection of excise and cigarette taxes by the BOE. Indeed, on this last section, the Rincon Band desires and intends to move forward with the State to seek resolution of these issues. The Band intends to formally engage the Governor in government-to-government discussions on the issue, but the Tribe extends an invitation to BOE to more fully explore the issue and establish the framework for a compact(s) governing such taxation and use of tax revenue.

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians

Attachment

Rincon Band of Luiseño Indians

PO Box 68 Valley Center, CA 92028 ♦ (760) 749-1051 ♦ Fax: (760) 749-8901



Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P O Box 942879
Sacramento, CA 94279-0044
Fax 916-322-0187

July 31, 2009

Comments of Rincon Band of Luiseño Indians Regarding Board of Equalization Publication 146: Tax Tips For Sales to American Indians and Sales on Indian Reservations¹

Dear Mr. Miller,

The Rincon Band of Luiseño Indians submits this as its formal response to the BOE's letter dated July 2, 2009.

General Comments

Publication 146 is intended as a guide for how the State of California handles the taxation of sales to Indians within the state as well as sales by entities (Indian and non-Indian) conducting business on a reservation, Rancheria or Indian trust lands. The Guide is helpful but does not adequately address many of the issues facing the Tribes and the State regarding taxation. We think it would be helpful if the Guide included an introductory section that outlines the basic principles of law surrounding state authority to tax Indians or Indian commerce. It should start with the basic premise that there are limits on state authority to impose a tax on Indian tribes or tribal members. The section should introduce the reader to the concepts regarding the legal incidence of the tax and preemption. It should also acknowledge the authority of Indian tribes to tax.

¹ In submitting these comments and participating in this process, The Rincon Tribe of Luiseno Indians should not be construed to bind the Tribe to any position that concedes state authority to any tax in any context. Nor should these comments be considered as a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands.

Rincon Band of Luiseno Indians
Comments re BOE Publication # 146

Bo Mazzetti July 31, 2009
Chairman Page 1 of 6

Gilbert Parada
Council Member

Charlie Kolb
Council Member

Steve Stallings
Council Member

While it is likely beyond the scope of the purpose for the guide, this might be a good place to also address the recent developments in the law regarding fuel, utility and cigarette taxes and tribal/state compacts.

The following comments address specific sections of the Guide:

1. Key Definitions

“Indian Organization”

The first paragraph of the term “Indian Organization” provides “corporations qualify as Indian organizations only if they are organized under tribal authority and wholly-owned by Indians.” This definition is incomplete. Corporations organized under federal law and wholly-owned by Indian tribes also qualify as “Indian Organizations” as that term is defined. In addition, there is no legal basis to broadly exclude tribally-chartered LLCs and partnerships not wholly-owned by Indians from qualifying for exemptions to the extent of the Indian ownership interest in these entities for activities conducted on a reservation.

The last paragraph of this section states: “for California sales and use tax purposes, a sale to an Indian organization is treated the same as a sale to an individual Indian.” This sentence should be qualified to recognize the difference between an individual Indian and Indian organizations that possess sovereign immunity for both governmental and commercial activities which are immune from suit by the State for business activities conducted on a Reservation.

“Reservation”

The note is not particularly helpful because if the land is within the boundaries of a reservation state tax law does not apply. What is the purpose of focusing on a gaming facility? Does your analysis change if the delivery is made to the purchasing department which is part of the gaming facility and then affixed to a structure in the adjacent parking lot?

“Sales Tax”

The second paragraph states “this is true even when most or all of your sales are not taxable, or qualify as exempt.” This should be explained to also clearly state that construction contractors, selling construction materials to an Indian tribe pursuant to a time and materials contract, holding a California seller’s permit as part of the required documentation for sales are not taxable or qualify as exempt.

“Construction Contracts”

This section title should be revised because it provides two statutory definitions: one for construction contractor and one for construction contracts.

This section would be more helpful to contractors, subcontractors and the public if it included a brief explanation on the applicability of Section 4, page 19, to both general contractors and subcontractors. There is great deal of confusion among prime contractors as to the applicability of contract form and documentation requirements for non-taxable/exempt sales of materials to Tribes made by subcontractors during contract performance on reservations.

Finally, this section should end with the statutory definition, Cal. Rev. & Tax Code § 6051(a), for “retailer” and a brief explanation that construction contractors holding a valid Seller’s permit are retailer for purposes of selling non-taxable/exempt construction materials to Indian organizations for construction activities performed pursuant to a time and materials contract on a reservation. This will clarify the “Construction Contractor as retailer” explanation on page 20.

2. Documenting Claimed Exempt Sales

Transfer of title (ownership) on the reservation

This section needs to be revised to clarify information for construction contractors who are deemed retailers, under Cal. Rev. & Tax Code § 6051(a), when they possess a valid Seller’s permit in connection with construction activities on a reservation. Contractors do not see themselves as retailers and this section does nothing to assist them in understanding how state law operates to include them in the definition of a retailer for purposes of selling non-taxable/exempt materials.

Retailers

Third bullet, “documents to show that ownership of merchandise transferred to the buyer on the reservation and delivery occurred there, such as contracts of sale, invoices, bills of lading, delivery receipts, and freight invoices.” The documents required of Indian purchasers are overbroad. Why does the state require the transactional documents? A sworn statement should suffice. Indeed, a presumption of sales on reservation to Tribal members is more appropriate. The onerous requirement of paperwork results in substantial overpayment to the State of tax revenue that should never be paid in the first instance. Indeed, a process should be in place to rebate back to the Tribe an amount approximating the amount of overpayment that occurs on a regular basis.

In the context of construction contracts, this section should reference the Reservation Statement of Delivery Form, BOE-146-RES (5-08). The notary requirement in BOE-146-RES (5-08) form is unreasonable in the context of on-going activities in connection with a time and materials construction contracts on a reservation. From a documentary standpoint, it should be sufficient that the parties identified on the form correspond to the contracted parties of the construction contract for which the materials were purchased and delivered.

Exemption Certificates

The requirement for "a description of the products or merchandise purchased under the certificate" is unreasonable in the context of a time and materials construction contract. The BOE should restate the essential elements to support a non-taxable/exempt sale of materials as follows: an exemption certificate on tribal/corporate letterhead, dated and executed by an authorized tribal/corporate official, a description or title of that certain construction contract to which the certificate applies and the project address or location. The certificate should be executed at time of contract or notice-to-proceed, provided to the prime contractor and applicable to any and all subcontractors in privity of contract with the prime contractor for all on-going materials purchases in connection with that certain construction contract.

3. Sales to Indians: Retailers Located Outside Indian Reservations

What is the logic of the requirement that if an item purchased by an Indian and delivered to a reservation is used or stored off the reservation over half time in the first 12 months, it is subject to the use tax? If that situation occurs in the second year of ownership rather than the first, it is not subject to the tax?

What is the logic for the rule that married couples, one of whom is a tribal member, must pay half of the tax. As a community property state, the marital community should benefit from the tax immunity of the Indian if they reside on a reservation. In the alternative, a mechanism should exist wherein the Indian member of the marital community can declare the item as his/her separate property and avoid the tax. The Guide should acknowledge the possibility that the full interest in the property is not subject to the tax.

4. Sales Related to Construction Contracts

Construction contractor as retailer.

The first element that "the contractor must be in the business of selling materials or other tangible personal property" is unreasonable, vague and without any legal basis. This implies there is a volume threshold for selling applicable to contractors before they could qualify as a retailer for non-taxable/exempt materials resale to Indians in the context of a time and materials construction contract. Contractors do not see themselves

as retailers. This element is misleading and may add to their confusion. Finally, the Seller's permit application, BOE-400-SPA Rev. (7-08), does not contain any questions or require any representations from contractors about being in the business of selling materials or other tangible personal property.

The third element that "the construction contract must *explicitly* provide for the transfer of title to the materials prior to the time the materials are installed, and must separately state the sales price of materials, exclusive of the charges for installation (for example, a time and materials contract)" needs specific information from BOE on appropriate cost control measures that fall within the statutory definition of a time and materials contract. Indian organizations and contractors engaged in construction activities on reservations, post- *Barona Band of Mission Indians v. Yee*, must use time and materials contract with no guidance on how to draft contract language relevant to controlling costs. BOE should provide specific examples of the appropriate use of cost control terms in the context of contract price for a time and materials contract."

The fourth element that "the construction contractor must provide a valid and timely resale certificate to its vendor" needs to be revised with an explanation on the correct use this certificate.

The BOE 230 (7-02) certificate needs to be revised to eliminate certification (2) "I am engaged in the business of selling ..." for the reasons stated above. Certification (5) should be revised so that the construction contract to which the certificate applies, the project address or location and a receipts attached are sufficient for documentation. The certificate should be executed at time of contract or notice-to-proceed, maintained by the contractors along with all materials purchases pursuant to the contract. Like the exemption certificate, the resale certificate should be a one-time form applicable to all on-going material purchases in connection with a certain construction contract.

Tax-exempt sales of materials under a construction contract.

Requirement (3)" the materials must in fact be delivered to the Indian customer on a reservation" should have a cross-reference to documentation requirements discussed on page 11. Same comment for requirement (4), cross-reference to page 12.

Finally, BOE should provide the reader with a concise checklist, with cross-references, to summarize all of the requirements for contractors to be "retailers", the requirements for "time and materials contracts," a BOE forms schedule and applicable record retention period (4 years) in the event of an audit.

Fixtures

There is no reasonable rationale for the BOE to distinguish between materials and fixtures. While the Guide allows for a construction contractor to act as a retailer and therefore avoid the tax, a simple rule treating materials and fixtures the same is recommended.

5. Sales by Retailers Located on Indian Reservations

On reservation Indian retailers should not have to collect and pay the use tax for sales to Indians who do not live on a reservation and non-Indians. The onus to pay the tax should be placed on the purchaser in the same way it is for purchasers who buy goods in another state.

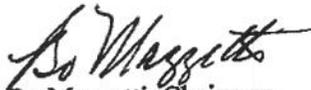
Since Indian retailers are subject to taxation by the tribe, BOE should consider establishing a tribal tax reciprocity program.

6. Special Taxes and Fees

BOE should clarify whether BIA roads are part of "a state or local road system". Rather than provide for taxing all fuel sales to Indian country and providing a mechanism for refunding the tax, the State and the Tribes should explore entering into compacts that recognize the Tribes authority to impose a tax and use the proceeds to fund governmental services or to improve reservation infrastructure along the lines that other tribes and states have done.

This could also apply to the imposition and collection of excise and cigarette taxes by the BOE. Indeed, on this last section, the Rincon Band desires and intends to move forward with the State to seek resolution of these issues. The Band intends to formally engage the Governor in government-to-government discussions on the issue, but the Tribe extends an invitation to BOE to more fully explore the issue and establish the framework for a compact(s) governing such taxation and use of tax revenue.

Respectfully Submitted,



Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians

Miller, Brad

From: GLENN FELDMAN [Glenn.Feldman@mwmf.com]
Sent: Monday, January 25, 2010 5:01 PM
To: Miller, Brad
Subject: publication 146

Attachments: Document.pdf



Document.pdf
(403 KB)

dear mr. miller: I attended the december 3rd meeting on behalf of the santa ynez, san pasqual and cabazon bands of mission Indians. attached please find several suggested revisions to the most recent revised draft of publication 146. I commented on each of these proposals at that meeting.

the addition to the definition of "Indian organization" is self-explanatory and is warranted in light of the fact that many tribes have recently adopted tribal "LLC ordinances."

my revisions on page 18 are intended to make it clear that an exemption certificate need not be notarized, and that a "duly authorized tribal representative" can effectively sign a document evidencing the fact that delivery of the materials took place on the reservation.

finally, my comment on page 22 is intended to clarify that the contractor need only be "in the business of selling materials" for purposes of the particular contract; that is, he may not be a retailer for all purposes, but if the particular contract in question designates him as a retailer of materials for that contract, the contractor can qualify as a retailer for purposes of obtaining the tribal tax exemption (provided, of course, that he gets a seller's permit and all of the other requirements are met).

I appreciate the work that you and others at the boe are doing to try to get this right. if you have any questions about my comments, please let me know. glenn

Glenn M. Feldman
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1. Key Definitions

This chapter provides definitions of specific terms used throughout the publication. It also explains essential conditions for tax-exempt sales to Indians and requirements for documenting those sales. Be sure to read it before proceeding to the following chapters.

Terms used throughout the publication

Please review these terms carefully. How tax applies to different sales can depend on whether a person, organization, or location fits the specific definitions below.

Indian

For California sales and use tax purposes, an "Indian" is a person who is both of the following:

- An individual of American Indian descent, and
- Eligible to receive services as an Indian from the United States Department of the Interior.

Indian couple

A married couple or a registered domestic partnership should be treated as an Indian couple for exemption purposes when it consists of two Indians or of an Indian and a non-Indian that have entered into officially recognized family relationships under California law or tribal law. This generally includes a married couple or a domestic partnership entered into under the Domestic Partner Rights and Responsibilities Act of 2003. Tribes have the authority to establish their own laws and regulations regarding such unions. Tribal laws include not only written laws, but may also include tribal customs and practices. However, such customs and practices must be that of the tribe, not of an individual tribal member. Therefore, if either California law or tribal law recognizes the family relationship, and at least one member of the couple is an Indian, the couple qualifies as an Indian couple.

Indian organization

"Indian organization" includes Indian tribes and tribal organizations. Partnerships qualify as "Indian organizations" for California sales and use tax purposes only when all of the members or partners are Indians. Corporations qualify as Indian organizations only if they are organized under tribal authority and wholly owned by Indians. If an organization does not meet these criteria, it does not qualify, even when owned or operated by Indians.

For California sales and use tax purposes, a sale to an Indian organization (or to an Indian couple as described above) is treated the same as a sale to an individual Indian. Please keep this in mind as you read this publication.

Reservation

For California sales and use tax purposes, a "reservation" can be any of the following:

- A reservation.
- A rancheria.
- Any land held by the United States in trust for any Indian tribe or Indian individual (also known as "trust land").

Please note: Not all portions of a facility housing an Indian gaming establishment may be located on "land held by the United States in trust for any Indian tribe or Indian individual." Some portions of a facility

LLCs qualify as Indian Organizations only if they are organized under tribal authority and all members are Indians.

documentation that you transferred title to the property on the reservation and that the sale of the property was to an Indian. For example, you may obtain documentation such as the following:

- One or more documents that show the purchaser is an Indian, such as a copy of the purchaser's tribal ID card, a letter from a tribal council, or a letter from the U.S. Department of the Interior.
- Documents to show that ownership of the merchandise transferred to the buyer on the reservation and delivery occurred there, such as contracts of sale, invoices, bills of lading, delivery receipts, and freight invoices.

To help you document exempt sales you may obtain an exemption certificate from the Indian purchaser. As discussed in more detail below, the exemption certificate should state that the Indian purchaser lives on a reservation. The exemption certificate will serve as support that the property was sold to an Indian. Therefore, if you obtain an exemption certificate, you will not need to obtain any additional documentation showing the purchaser is an Indian such as a tribal ID card. You will still need to retain documentation showing transfer of title and delivery of the property to the Indian on a reservation.

The BOE-146-RES, *Statement of Delivery on a Reservation*, is available on page 35. The BOE-146-RES contains all of the required elements of an exemption certificate. ~~Additionally,~~ it contains a section that may be completed by a notary public to document delivery of the property on the reservation. If you obtain a properly completed ~~and notarized~~ BOE-146-RES, you do not need to obtain any additional documentation showing the property was delivered directly to the purchaser on a reservation.

If a state-licensed notary public is not readily available to document delivery of the property on the reservation, ~~please note that many tribes have tribal council officers who may act in the capacity of notary public for the purpose of documenting~~ delivery on the reservation. Certification of delivery on the reservation by a ~~tribal council officer~~ is acceptable.

Purchasers

If you are an Indian who lives on a reservation, you will need to provide documentation to the retailer that you qualify for the tax exemptions explained in this publication. Generally, you will need to provide the retailer with a signed exemption certificate stating that you live on a reservation. In lieu of providing the retailer with an exemption certificate, you may provide the retailer with documentation showing you are an Indian, such as a tribal ID card, a letter from your tribal council, or a letter from the U.S. Department of the Interior, and documentation that you reside on a reservation.

If you are an Indian organization, you must also provide documents to prove that you qualify for the tax exemptions explained in this publication. For example:

- If your organization is a partnership, you should provide the retailer with documents that show all of your partners are Indians, such as partnership agreements.
- Documents showing that your organization is an Indian tribe or tribal organization.
- If your organization is a corporation, you should provide the retailer with documents that show it is organized under tribal authority and wholly owned by Indians, such as the organization's articles of incorporation.
- An "exemption certificate" containing certain other required content (see next section).

Exemption certificates

A seller is relieved of the liability for sales tax if the purchaser certifies in writing to the seller that the property is subject to an exemption. An exemption certificate must be in writing, issued timely, and

{ a duly authorized tribal representative may document

Although notarization of the form is not required,

Sales to non-Indian contractors

Materials

Generally, construction contractors are consumers of materials that are furnished and installed in the performance of a construction contract. As a consumer, tax generally applies to sales of materials to contractors who are not Indians. This is true even when the materials are delivered on a reservation and permanently attached to real estate on a reservation.

Construction contractor as retailer of materials

Under certain specific circumstances, a construction contractor performing a construction contract may qualify as a retailer of materials by meeting each of the following requirements (please note that these requirements are distinct from the requirements for exemption discussed below):

- The contractor must be in the business of selling materials or other tangible personal property.
- The contractor must possess a valid seller's permit.
- The construction contract must *explicitly* provide for the transfer of title to the materials prior to the time the materials are installed, and must separately state the sales price of materials, exclusive of the charges for installation (for example, a time-and-materials contract).
- The construction contractor must provide a valid and timely resale certificate to its vendor.

It is not uncommon for construction contractors that furnish and install materials only to not have a seller's permit. For example, a construction contractor that furnishes and installs carpet and tile and makes no over-the-counter sales of materials is generally not required to hold a seller's permit. If such a construction contractor wishes to enter into a construction contract with an Indian on an Indian reservation to furnish and install materials, the construction contractor may obtain a seller's permit and act as a retailer of the materials, provided all of the requirements listed above are met. If the construction contractor does not obtain a seller's permit, the contractor may not act as a retailer of the materials.

Fixtures

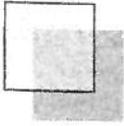
Sales tax generally does not apply to the sale of fixtures to non-Indian contractors when the contractors furnish and install the fixtures on an Indian reservation. You should obtain a completed and timely California resale certificate from the contractor. Please refer to publication 103, *Sales for Resale*, for additional information.

Sales by construction contractors

Sales to Indians—Contracts for work on Indian reservations

As a construction contractor, when your customer is an Indian, tax generally does not apply to your sales of *fixtures* furnished and installed as part of a construction contract for work on an Indian reservation. This is because a contractor is a retailer of fixtures that are furnished and installed in the performance of a construction contract and the retail sale takes place on an Indian reservation.

However, the same provisions do not necessarily apply to materials since a contractor is generally a consumer of materials that are furnished and installed in the performance of a construction contract. Unless you qualify as a retailer of materials, as provided above, you are the consumer of materials and tax is generally due on your purchase of those materials.



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January 26, 2010

VIA E-MAIL

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Revised Publication 146, Sales to American Indians and Sales on Indian Reservations

Dear Mr. Miller:

The Lytton Rancheria of California, a federally-recognized Indian tribe (Tribe) submits the following comments to the State Board of Equalization's (SBOE) Revised Publication 146, Sales to American Indians and Sales on Indian Reservations.

The Tribe appreciates the SBOE's revision of Publication 146 to address many of the comments submitted by the Tribe and others on the initial draft Publication 146. However, there are a number of issues noted in the Tribe's initial comments that are not addressed in the revised document. The Tribe believes that it is imperative that Publication 146 provide further guidance and clarity given the complex nature of sales transactions involving Indians. While the Tribe applauds the SBOE's efforts to clarify the laws relating to sales transactions in Indian Country, the Tribe is concerned that many parts of Publication 146 are still unclear, particularly for vendors who do not deal with Indian tribes on a regular basis. By providing clear guidance now through Publication 146 the SBOE can help Tribes, vendors, and the state avoid unnecessary confusion and/or litigation in the future. Thus, the Tribe again requests that the SBOE include further guidance and clarity in Publication 146 on the following:

Definitions

The SBOE should give consideration to revising the definition of Reservation to clarify whether, for purposes of Regulation 1616, a Reservation includes rights-of-way, easements, or fee land within the boundaries of an Indian reservation.

Requirement that Ownership Transfer on the Reservation

Many vendors prefer to have title transfer upon shipping (i.e., FOB Origin) so that the risk of loss is borne by the tribe. Often times, the only way to get a vendor to agree that title will transfer upon delivery to the reservation (i.e., FOB Destination), is for the tribe to expressly assume liability for any loss that occurs during shipment. While the Tribe does not believe that merely assuming liability during shipment equates to a transfer of ownership, risk of loss is technically linked to ownership. Since Publication 146 does not address this issue, tribes cannot be certain that agreeing to assume risk of loss during shipment will not jeopardize their exemption. The Tribe believes that clarity regarding this issue is of vital importance as many tribes in California face this issue on a regular, if not daily, basis. Thus, The Tribe requests that the SBOE revise Publication 146 to specifically address whether a tribe's agreement to assume liability for merchandise during shipment equates to a transfer of ownership.

Responsibility for Collection Use Tax

There are still a number of places in Publication 146 that require a seller to collect use taxes despite the fact that the incidence of such tax falls on the purchaser. As noted previously, the Tribe believes that the responsibility for collecting the use tax should never be placed on the seller as doing so presents significant, and sometimes insurmountable, problems.

First, placing the responsibility on the seller may result in a tribe having to either forego dealing with a specific vendor or paying unnecessary taxes. The Tribe has encountered major issues with vendors relating to the collection of use taxes because vendors are fearful that if they do not collect use taxes, they will get audited. Understanding the use tax exemption is difficult, particularly for individuals or entities who do not have much experience with Indian tribes. As a result, many vendors simply will not agree to exempt a tribe from the payment of use tax. Second, sellers are not in a position to make a determination regarding use taxes because it is impossible for the seller to know whether or not the merchandise will be used off-reservation more than one-half of the time.

Given the difficulties created by requiring sellers to collect use taxes, the Tribe requests the SBOE consider revising Publication 146 so that the responsibility for the payment of use taxes is always on the purchaser. If, however, the SBOE decides that the responsibility will remain, in some instances, on the seller, Publication 146 should be revised to clarify that where the purchaser is a tribal entity and the merchandise is delivered on the reservation, the presumption is that the merchandise will be used on the reservation more than one-half of the time. Finally, the SBOE should also clarify how the seller is expected to determine whether or not the merchandise will be used off the reservation more than one-half of the time.

Construction Contracts

The area of construction contracts is extremely important to Indian tribes. For most tribes, the potential taxes related to materials used in the construction of on reservation facilities

represent a significant concern. In addition, construction contracts represent the most complex and misunderstood area relating to tribal tax exemptions and thus is the area which most often results in disagreement and litigation. Given the import and complexity of this area, it is vital that the discussion of construction contracts in Publication 146 be as clear and concise as possible. While some of the Tribe's initial comments are addressed in the revised document, the Tribe requests that the SBOE also include clarification on the following:

1. What constitutes delivery on a reservation? If a delivery is made within an easements or rights-of-way within the boundaries of a reservation does this constitute delivery on a reservation? What about delivery to fee land within the boundaries of a reservation?

2. Who can accept delivery of materials? Publication 146 currently provides no guidance on this issue. In providing further guidance, the Tribe urges the SBOE to explicitly permit the construction contractor to accept delivery on behalf of the tribe. It is very important that the construction contractor be permitted to accept delivery since it is the construction contractor who, in the normal course of business, is routinely on-site. If delivering the materials to the construction contractor is not permissible, who from the tribe can accept delivery (bearing in mind that the authority should be broad as limiting the authority to, for example, the Tribal Chairman, or the Tribal Council, would be burdensome as such individuals are very busy and often travel a great deal)?

4. Does a tribe need to "appoint" somebody as its agent for delivery? If so, how formal does this appointment need to be (i.e., does the tribe need to prepare a formal written designation of agent)?

5. The requirement that the contractor must be "in the business of selling materials or other tangible personal property" needs clarification. It is our understanding that as long as a construction contractor holds a Seller's Permit, the SBOE will consider the contractor to be "in the business of selling materials...." Publication 146, however, does not make this clear. Thus, the SBOE should consider adding language stating that any contractor holding a Seller's Permit will be considered to be in the business of selling materials or other tangible personal property.

The Tribe appreciates the opportunity to submit these comments and hopes the SBOE will continue to give due consideration to the necessity of providing clear and thorough guidance now to avoid future confusion and litigation.

Sincerely,



Kathryn A. Ogas
Attorney for the Lytton Rancheria of
California

Comments of the Lytton Rancheria of
California on Revised Publication 146



Smith River Rancheria

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Tribal
Administrator

January 26, 2010

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Publication 146

Mr. Miller:

On behalf of the Smith River Rancheria, I am submitting comments to the proposed revisions of Publication 146. We appreciate the opportunity to provide input on this matter.

DEFINITIONS-Page 7

I would recommend the inclusion of the following definition:

Exemption Certificate

An "Exemption Certificate" shall include any forms or certificates created by the Board of Equalization which addresses the tax exempt status of a sale transaction involving an Indian Purchaser, as well as any documentation which establishes an Indian Purchaser qualifies for the tax exempt status for a sales transaction.

On page 7, it states: "For California sales and use tax purposes, a sale to an Indian organization (or to an Indian couple as described above) is treated the same as a sale to an individual Indian. Please keep this in mind as you read this publication."

The decision to clarify that Indian organizations and Indian couples are to be treated the same as individual Indians for California sales and use tax purposes is appropriate. However, rather than having the sentence above inserted within the definition of "Indian Organization", I would recommend a new definition be added:

Indian Purchaser

"Indian Purchaser" shall include "Indians," "Indian couples" and "Indian organizations," and shall all be treated the same as a sale to an individual Indian.

"Indian Purchaser" should then be globally incorporated throughout the publication wherever appropriate.

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AUDIT & INFORMATION

*Waa-saa-ghitlh-'a~ Wee-ni Naa-ch'aa-ghitlh-ni
Our Heritage Is Why We Are Strong*

The definition of “Indian organization” should be amended as follows:

Indian organization

“Indian organization” includes Indian tribes and tribal organizations. Partnerships qualify as “Indian organizations” for California sales and use tax purposes only when all the members or partners are Indians, or an Indian couple. Corporations qualify as Indian organizations only if they are organized under tribal authority, including state and/or federally chartered corporations organized by Indian tribes and/or individual Indians, wholly owned by Indians. If an organization does not meet these criteria, it does not qualify, even when owned or operated by Indians.



PURCHASERS-Page 18

This section should be amended to include what documents will be acceptable to support the tax exempt status of Indian couples. The documentation necessary to prove an organization qualifies for the tax exemption should include documentation of state or federal incorporation, if applicable.



EXEMPTION CERTIFICATES-Beginning Page 18

With respect to the paragraph that addresses the use of a state-licensed notary public: The issue of a notary public was discussed in great detail during the December 3, 2009 conference call. Many tribal representatives complained that even though the use of a state-licensed notary public is discretionary (a tribal official can also notarize), many sellers have made it a requirement in order to execute the transaction, even when it is clear the transaction involves an Indian Purchaser, and ownership is to be transferred, and delivery is to occur, on the reservation. Unless a Tribe retains the services of a notary public, this becomes an unnecessary burden. The law only obligates the seller to obtain satisfactory evidence that the sale is tax exempt. Since the law does not require the statement to be notarized, I would recommend this paragraph, as well as the “Notary Statement” within the Exemption Certificate (discussed below) be eliminated completely.

The title “For individuals” sub-section at the top of page 19 should be amended to include “For individuals and/or Indian couples.”

The last sentence of this sub-section should be amended as follows: “A statement that the property is being purchased for use on a reservation by an Indian Purchaser who lives on a reservation.”

The “Good Faith” sub-section at the bottom of page 19 addresses the use of post office boxes. As currently drafted, if a delivery of property is made to the off-reservation post office box, the exemption does not apply. This will result in disparate impact on Indian purchasers, who may have no choice but to use a post office box, since the U.S. Mail may not be delivered to the reservation. Delivery to a post office box should not preclude the tax-exempt status of the transaction, if the property being purchased will be used on reservation, by Indian Purchasers eligible for a tax exemption. Further, because many reservations are remote, many official tribal offices where deliveries occur for tribal organizations and tribal members are located off the reservation on fee land.

A recommended modification would be as follows:

“If delivery of the property is made to an off-reservation post office box, or to the official office of a federally recognized Tribe, the exemption will apply if the Indian Purchaser provides a declaration or documentation indicating that on-reservation delivery to the reservation is unavailable, and that the property being purchased is to be used on the reservation.”



Table 9: Proper Application of Tax-Page 33

The section titled “Purchaser” needs to be globally amended to either incorporate “Indian Purchaser,” or alternatively include “Indian, Indian couple or Indian organization” wherever “Indian” is referenced.



EXEMPTION CERTIFICATE-Page 35

The exemption certificate should be modified to address not only the exemptions for individual Indians, but also Indian couples and Indian organizations. The certificate should also address when delivery occurs to a post office box or to a tribal office, by stating: “If delivery occurs to a post office box, or to the official office of a federally recognized Tribe, the sales tax shall not apply if the Indian Purchaser provides to seller adequate documentation to prove that on-reservation delivery is not possible.”

The “Notary Statement” should be deleted in its entirety.



In closing, again I wish to restate that we appreciate the efforts of the Board of Equalization to work collaboratively with the federally recognized tribes within California on this matter. Should you have any questions, you may reach me at the address and telephone number on the letterhead, or speak to our Tribal Administrator, Russ Crabtree.

Sincerely,

Kara Miller, Chairperson
Smith River Rancheria

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January 7, 2010

Via Fax: 916-322-0187; e-mail: Brad.Miller@boe.ca.gov, and U.S.P.S.

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P O Box 94279-0044
Sacramento, CA. 94279-0044

RE: Comments of Draft Publication 146
Our File No. 82.35.2.7

Dear Mr. Miller:

I represent the Northern Circle Indian Housing Authority, which is a multi-tribal housing authority serving six federally recognized Indian tribes in Northern California. NCIHA has built numerous housing projects on the Indian lands of its member tribes since it was first established in 1978.

It began using construction contracts to exempt its housing projects from state sales and use tax, beginning in the early 1980's, relying on letter advice from Tax Counsel for the State Board of Equalization.

NCIHA applauds the efforts of the SBOE to explain the requirements in state regulations which apply to the imposition of sales tax and use tax on Indians and Indian organizations. NCIHA believes that Publication 146 as it is proposed will provide valuable guidance to Indians and Indian tribes on the application of state sales and use tax to their purchases.

The publication and the state regulations could be improved if they more directly addressed Indian organizations. The definition of "Indian organization" contained in the publication comes directly

from SBOE regulation 18 CCR Section 1616(d)(2). It states:

Indian organization:

“Indian organization” includes Indian tribes and tribal organizations. Partnerships qualify as “Indian organizations” for California sales and use tax purposes only when all of the members or partners are Indians. Corporations qualify as Indian organizations only if they are organized under tribal authority and wholly owned by Indians. If an organization does not meet these criteria, it does not qualify, even when owned or operated by Indians.

Publication 146 states: “For California sales and use tax purposes, a sale to an Indian organization (or to an Indian couple as described above) is treated the same as a sale to an individual Indian. Please keep this in mind as you read this publication.”

NCIHA is a tribal organization. It is a separate legal entity created by tribal law to perform a tribal function on behalf of the tribes that created it. However, there is no definition of Indian organization in the publication or in SBOE regulations. The regulation and publication do specifically address partnerships and corporations. The failure of the publication and the regulation to specifically address other types of tribal organizations and to only recognize corporations formed under tribal authority has not created a problem for NCIHA in the past, but the publication and the regulation could be improved, if they recognized that other types of tribal organization than corporations formed under tribal law have been recognized as having the same status for jurisdictional purposes as Indian tribes. For example, tribal sovereign immunity extends to an entity established by a tribe to conduct certain activities, if that entity "functions as an arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). See, also, *Trudgeon v. Fantasy Springs Casino* (1999) 71 Cal.App.4th 632.

A corporation of a federally recognized Indian tribe chartered under Section 17 of the Indian Reorganization Act (25 U.S.C. §477) has been repeatedly recognized as functioning as an arm of the tribe and, therefore, as being protected from suit by the tribe’s sovereign immunity. *Maryland Casualty Co. v. Citizens National Bank of West Hollywood* (5th Cir. 1966) 361 F. 2d 517, 521; *Parker Drilling Co. v. Metlakatla Indian Community* (D. Alas. 1978) 451 F. Supp. 1127, 1136. Section 17 Tribal corporations are also treated as non-taxable entities by the IRS. An Indian housing authority, like NCIHA, has been recognized as possessing the sovereign immunity of the tribe that created it. See, e.g., *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998).

The publication could be improved if this added guidance were included.

The publication states that the exemption from state sales tax only extends to Indians who reside

Letter to Bradley Miller
Subject: Publication 146
Date: January 7, 2010

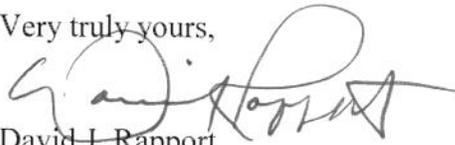
Page 3

on an Indian reservation. As to tribal organizations, the publication simply states that the organization is entitled to the same exemption that applies to "Indians." The publication does not address what constitutes the "residence" of a tribal organization, although it does say that if ownership of taxable property transfers to the Indian on an Indian reservation, it does not have to be the reservation where the Indian resides in order to qualify for the tax exemption.

NCIHA's administrative offices are located on a reservation, but it contracts for construction and purchases personal property which may be delivered to other reservations. If NCIHA is regarded as "residing," where its administrative office is located, then it should be entitled to an exemption for state sales and use tax, where personal property is delivered to any of these reservations or construction work is performed on any of these reservations. The publication could be improved, if it clarified what constitutes residence for tribal organizations.

Thank you for consideration of these comments. If you have any questions, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "David J. Rapport", written over a circular stamp or mark.

David J. Rapport

cc: Darlene Tooley, Executive Director, NCIHA

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January 6, 2010

VIA E-MAIL TO: Brad.Miller@boe.ca.gov

Bradley Miller
Tax Policy Division
California State Board of Equalization
P. O. Box 94279-0044
Sacramento CA 94279-0044

RE: Comments on SBOE Publication 146, Sales to American Indians and Sales on
Indian Reservations
Our File No. 80.5.2.2

Dear Mr. Miller:

Our law firm is general counsel for the Chemehuevi Indian Tribe. The Chemehuevi Indian Tribe is a federally recognized Indian tribe organized under the provisions of the Indian Reorganization Act under a written Constitution, which has been approved by the Secretary of the Interior which designates the Chemehuevi Tribal Council as the governing body of the Tribe.

Charles Wood, the Chairman of the Tribe, has referred Publication 146 to our office for review and comment. Our office participated in the meeting held on Thursday, December 3, 2009, by way of conference call.

After reviewing the proposed Publication in its entirety, our office submitted the following comments on behalf of the Tribe at the December 3, 2009, meeting.

1. The definition on page 7 of "Indian organization" should be modified to provide that federally chartered corporations organized under Title 25 of the United States Code § 477 shall be considered an Indian organization.

2. The definition of "Reservation" on page 7 should include "all Indian country as defined by Title 18 of the United States Code § 1151."

RE: Comments on SBOE Publication 146, Sales to American Indians and Sales on Indian Reservations

3. On page 8, under the heading “Sales tax and use tax: what’s the difference? Sales tax,” the last sentence of the first paragraph should be modified to read as follows: “As noted in the “Preference,” there is no general exemption under State law from the sales tax for sales to Indians.”

4. The second paragraph in that same section on page 8 should be modified to make it clear that an Indian residing on the Indian’s reservation who has a business located on his or her reservation and is making retail sales of tangible personal property is not required to have a California seller’s permit.

5. The subsection entitled “Use tax,” under the section “Sales and use tax: what’s the difference?,” on page 8, should be modified to state that the purchase of a vehicle outside of the State by an Indian who resides on his or her reservation is not subject to use tax where the Indian purchases the vehicle outside the State, drives it directly to the reservation after the purchase, and uses the vehicle more on the reservation than off the reservation within the first year after the vehicle is purchased.

6. In the first paragraph under the heading “Permit requirements” on page 12, the paragraph should be modified by deleting the period out of the first paragraph and adding to it a comma and the following language: “unless your business is located on the reservation and you are an Indian residing on your reservation.”

7. The first paragraph under the heading “Tribal taxes” on page 14 should be modified. After the first sentence should be inserted the following: “The amount of the tribal tax should not be included in the retail selling price of the product being sold for the purpose of determining the amount of the California sales or use tax when the following apply.” The second sentence in that paragraph should be deleted and the second sentence in the second bullet point should be deleted in its entirety.

8. Under the section entitled “Transfer of title (ownership) on the reservation” on page 17, the fourth paragraph down that starts out with the words: “In addition, the retailer generally must deliver the product;,” a new paragraph 3 should be added to the section that provides as follows: “3. By a designated agent of the seller where both the seller and his agent executed declaration under penalty of perjury that the seller appointed the agent as his agent and the agent delivered the vehicle to the Indian on the reservation with the intent that title to the vehicle pass upon delivery.”

9. Under the section entitled “Fuel taxes” on page 24, a paragraph should be added to the section explaining that if the sale is from an out-of-state retailer directly to a federally recognized Indian tribe, who then sells the fuel to a member of the tribe residing on the reservation, that that sale or transaction is exempt from the State’s motor vehicle fuel tax.

**Letter to Bradley Miller
January 6, 2010**

Page 3

RE: Comments on SBOE Publication 146, Sales to American Indians and Sales on Indian Reservations

10. Finally, a section should be added to the Publication to make it clear that a federally licensed Indian trader does not need to obtain a California seller's permit in order to make sales to Indian tribes or Indians on their respective reservation.

On behalf of the Tribe, I request that you make these changes to Publication 146. I would appreciate it if you would confirm that these changes were made to the Publication.

If you have any questions regarding this letter, please do not hesitate to give me a call. Your assistance and cooperation in this matter is greatly appreciated.

Yours very truly,

A handwritten signature in cursive script that reads "Lester J. Marston".

LESTER J. MARSTON
Attorney at Law

LJM/cf

cc: Charles Wood, Chairman, and Members of the Chemehuevi Tribal Council

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January 19, 2010

VIA ELECTRONIC AND FIRST CLASS MAIL

Mr. Bradley Miller
Tax Policy Division
Board of Equalization
P.O. Box 942879
Sacramento, CA 94279-0044

Re: Comments on Publication 146

Dear Mr. Miller:

We write on behalf of a tribal client in response to the BOE's request, made during the consultation meeting of December 3, 2009, that tribes submit sample contract language for the BOE's consideration and inclusion in Publication 146. We appreciate the opportunity to provide input on this matter.

Regulation 1521 provides that contractors will only be deemed retailers of the materials they provide and install if their construction contracts explicitly provide for the transfer of title to the materials prior to the time the materials are installed, and separately state the sales price of materials, exclusive of the charge for installation. 18 CCR 1521(b)(2)(A)(2). Publication 146 repeats these requirements but does not provide examples of contract language that satisfies them. While contractual provisions that satisfy these requirements may be drafted in any number of ways, we believe it would be helpful to tribes if BOE were to publish some specific examples.

We propose such language below. We recognize that determining whether a contract meets the requirements of regulation 1521 requires a case-by-case analysis. Clearly, there is no magic language that, if inserted into a contract, would guarantee that the contract as a whole satisfies BOE's regulatory requirements because other provisions in the same contract may contradict or otherwise undermine such language. Nonetheless, we believe that providing sample contract language will assist tribes in meeting BOE requirements as long as BOE clarifies that all other contractual provisions must comport with, and support, the sample language.

We note that on large construction projects it is difficult to predict at the outset the final cost of all of the materials that a contractor will sell to the owner. Accordingly, it is necessary to

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permit tribes and their contractors to alter the cost of materials stated in the initial contract either by change order or through some other consensual mechanism. In order to allow for the requisite flexibility while still meeting the BOE's requirement that the cost of materials be stated separately in the construction contract, we propose using the following contractual provisions, intended primarily for use in guaranteed maximum price contracts. Our proposal requires that each of the three provisions detailed below be included in each construction contract.

Contract Sum

The sum of the Cost of the Work and the Contractor's Fee is guaranteed by the Contractor not to exceed an aggregate amount, hereinafter the "Guaranteed Maximum Price," equal to \$ _____. The Cost of the Work shall include materials that are exempt from sales tax under 18 CCR 1616(d)(4)(C), which materials Contractor shall, pursuant to this Agreement, sell or cause to be sold to Owner. The final cost of such materials is estimated to be \$ _____. Changes to the cost of materials exempt from sales tax under 18 CCR 1616(d)(4)(C), stated above, shall be effected through change orders, which shall in all cases separately state the cost of such materials.

Two Agreements

Notwithstanding anything to the contrary contained herein, this Agreement is intended to constitute, and shall be construed and interpreted as if it constitutes, two (2) separate agreements with regard to materials exempt from sales tax under 18 CCR 1616(d)(4)(C), as follows:

- (a) one for the *retail sale* of such materials from the Contractor to the Tribe, with delivery to the Tribe and transfer of title to the Tribe occurring on the Reservation prior to installation; and
- (b) one for the later *installation* (and labor associated therewith) of the Tribe's materials into the Project.

Contractor as Seller

It is the intent of the parties that Contractor, Subcontractors and Sub-subcontractors be "sellers" of materials as provided in 18 CCR § 1521(b)(2)(A)(2).

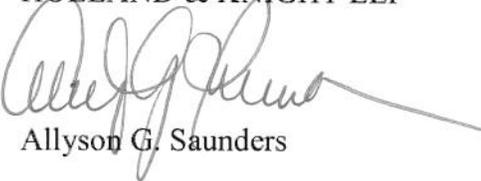
As explained above, we recognize that simply inserting this language into a contract alone is not sufficient to cause the contract, and the tribe's and contractor's execution of that contract, to comply in all respects with BOE requirements. Nonetheless, there is value in providing sample contract

Mr. Bradley Miller
January 19, 2010
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language that the BOE finds acceptable because doing so will provide tribes with a modicum of clarity that they do not have today.

Sincerely yours,

HOLLAND & KNIGHT LLP



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COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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December 1, 2009

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RE: Colorado River Indian Tribes Initial Comments on Revised Draft of Publication 146, *Sales to American Indians and Sales on Indian Reservations*

Dear Mr. Miller:

The Colorado River Indian Tribes ("Tribes"), a federally-recognized sovereign Indian tribe with Indian reservation lands in both the states of Arizona and California, hereby provide initial comments in response to the California Board of Equalization's ("BOE") request for comments on the Revised Draft of Publication 146, *Sales to American Indians and Sales on Indian Reservations*.

General Comments

The Tribes appreciate the opportunity to comment on the proposed Revised Draft of Publication 146. However, the Tribes only received a copy of the Revised Draft of Publication 146 by electronic mail on November 30, 2009, less than four days before the meeting scheduled to discuss the Revised Draft of Publication 146 on December 3, 2009. This short time frame does not allow the Tribes adequate time to prepare detailed comments, and the Tribes trust that it will be provided with more time to review and comment upon any final draft of the revised publication. The Tribes expressly reserve the right to provide additional comments at such time as a final draft of the revised publication circulated for comment.

Specific Comments

It is a laudable goal to better illustrate the complicated nature of sales transactions within Indian Country. However, the Tribes are concerned that the BOE's effort to simplify the sales transactions at issue have glossed over some critical issues and may give rise to more questions

from both retailers and purchasers. In particular, the Tribes have five initial concerns with the proposed Revised Draft of Publication 146.

First, on page 3 in the “Preface” section, BOE references Public Law 83-280 as one of the “pertinent laws and regulations” that BOE is subject to when dealing with Indians and Indian tribes. This statement is legally incorrect. Public Law 280 did not provide any grant of jurisdiction to the state of California with respect to civil regulatory matters, including taxation, within Indian Country. *E.g., Bryan v. Itasca County*, 426 U.S. 373 (1976). Therefore, Public Law 280 is not a “pertinent” law that applies to BOE with respect to Indians, Indian tribes, or Indian lands, and its reference should be deleted.

Second, on page 8 in the “Key Definitions” section, BOE uses the term “non-reservation” land to refer to areas of an Indian gaming facility that might not be situated on tribal trust land. Use of the term “non-reservation” in this context is imprecise and, in most circumstances, is incorrect. For example, using BOE’s hypothetical Indian gaming facility with a footprint that extends over both Tribal trust land and non-trust land, the fact that some non-gaming portions of an Indian gaming facility might be situated on non-trust land does not mean that such land is “non-reservation.” This is especially true given the circular nature of BOE’s definition of a “reservation” to include “A reservation”.¹ See Revised Draft at 7. The Tribes assume that BOE means an Indian reservation as defined as part of 18 U.S.C. § 1151(a) as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.” If a “reservation” includes all land within reservation boundaries, as it should, then the hypothetical gaming facility BOE describes will always be on an Indian reservation, regardless of the exact nature of the underlying landownership. BOE should consider either using the term “non-trust” land for the hypothetical situation described in the “Note” on pages 7 and 8, or better define “Indian reservation” by reference to federal law.

Third, while there is ample discussion of sales by and to individual Indians, there is inadequate discussion of sales to “Indian organizations” which BOE defines to include Indian tribes. The emphasis on sales to individuals ignores the fact that Indian tribes are major players in the California economy and frequently make purchases from non-Indian retailers both on and off reservations lands. Nevertheless, the revised draft fails to clearly discuss sales to Indian tribes. It is possible that BOE intended to include “Indian organizations” by referring to the vague undefined term of “Indian customer” found on page 9 or the similarly vague and undefined term “Indian purchaser” found on page 12. However, short of a more precise definition of these terms, a reader of the revised draft publication could come away with no additional understanding of how California treats sales to Indian tribes. This shortcoming should be addressed before a final draft is released.

Fourth, the Tribes appreciate the discussion of Tribal licenses and Tribal taxes as applied to retailers located on Indian reservations in Section 3. It is a correct statement that “[t]he

¹ A similarly unhelpful description of a term that should be revised is found on page 21: “sales tax does not apply to sales of materials to Indian construction contractors (construction contractors that are Indians) . . .” Revised Draft at 21 (emphasis added).

imposition of a tribal tax does not affect the liability for California sales or use taxes” (page 14) and that “[a] tribal sales license is *not* a legal substitute for a California seller’s permit or a certificate of registration to collect use tax” (page 12, emphasis in original). However, BOE fails to address the fact that the opposite is also true, namely: compliance with California state law does not in any way obviate the need for retailers making sales within Indian reservations to obtain all necessary tribal licenses and comply with applicable tribal tax laws. BOE should revise Section 3 to make clear that retailers making sales within Indian reservations have an independent obligation to comply with any applicable tribal laws.

Fifth, the catch-all discussion of the various other special taxes and fees that might apply to sales to Indians and sales on Indian reservations on pages 24-27 is not terribly illustrative for readers and seems to be included as an afterthought. This section should be revised to add additional materials or replaced in its entirety with citations to other BOE publications.

Conclusion

The Tribes appreciate the opportunity to submit these initial comments. We trust that these initial comments will be considered and incorporated into the final draft of the revised publication circulated for comment.

Sincerely yours,

COLORADO RIVER INDIAN TRIBES



Eldred Enas
Chairman

cc: Tribal Council
Eric N. Shepard, Attorney General



Campo Band of Mission Indians

Chairwoman Monique La Chappa
Vice Chairwoman Michelle Cuero
Secretary Kerm Shipp
Treasurer June Jones
Committee Nancy Cuero
Committee Dominique Connolly
Committee Benjamin Dyche

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November 23, 2009

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RE: Comments To Pending Draft Publication 146: Sales to American Indians and Sales on Indian Reservations

Dear Mr. Miller:

The Campo Band of Mission Indians submits the written comments below as its formal response to the BOE's letter dated November 13, 2009 ("Draft Publication 146").

Draft Publication 146 is intended as a guide for how the State of California handles the taxation of sales to Indians within the state as well as sales by entities (Indian and non-Indian) conducting business on a reservation, Rancheria or Indian trust lands. It is helpful but does not adequately address many of the issues facing the Band and the State regarding taxation. In submitting these comments and participating in this process, nothing set forth in this letter should be construed to bind the Band to any position that concedes state authority to any tax in any context. Nor should these comments be considered as a complete inventory of all issues and concerns regarding BOE's position on taxation on Indian lands. We have reviewed the Draft Publication 146 and suggest the following revisions:

Section 1 - Definitions

Indian organization

"Indian organization" includes Indian tribes and tribal organizations. Partnerships qualify as "Indian organizations" for California sales and use tax purposes only when all of the members or partners are Indians. Corporations qualify as Indian organizations only if they are organized under tribal or federal authority and wholly owned by Indians. If an organization does not meet these criteria, it does not qualify, even when owned or operated by Indians.

Federally-chartered corporations under Section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. §477, are wholly-owned by Indian tribes and authorized under

federal, not tribal authority. The publication should be revised to include these entities along with those corporate entities organized under tribal law.

2. Sales to Indians: Retailers Located Outside Indian Reservations

Married couples or registered domestic partners

Assuming all other requirements for exemption are met, sales of tangible personal property by an off-reservation retailer to an Indian couple are not subject to sales tax. An Indian couple, as defined on page 7, consists of a married couple or registered domestic partnership that consists of two Indians or of an Indian and a non-Indian that have entered into officially recognized family relationships under California law or tribal law.

~~*Please note: An Indian couple may be liable for use tax on the purchase price of the property if the property is used off the reservation more than one half of the time during the first 12 months following delivery.*~~

The above qualification for use of product off-reservation as subject to use tax within 1 year of purchase should be deleted. What is the underlying rationale for the time period of 12 months? This time threshold is arbitrary when compared to the useful life of most items of personal property and impracticable from an enforcement perspective. Residents of the reservation should benefit from the tax immunity that comes with location of residence. Any use tax applied to personal property that is used off-reservation within the first 12 months of purchase is an impermissible tax in violation of Cal. Reg. 1616(d). In addition, if this rule is to be included in the publication, it should be stated uniformly throughout. The draft states this rule as follows:

Page 9 – Married couples or registered domestic partners

~~*Please note: An Indian couple may be liable for use tax on the purchase price of the property if the property is used off the reservation more than one half of the time during the first 12 months following delivery.*~~

Page 10 – Mobilehomes

A sale of a mobilehome to an Indian purchaser who lives on a reservation and takes ownership and delivery on a reservation will not be exempt from tax if the mobilehome is used off the reservation more than one-half of the time in the first 12 months after the sale.

Page 12- Sales by on-reservation Indian retailers to non-Indians and Indians who do not reside on a reservation

In such an instance, the Indian *purchaser* may be required to pay use tax, but only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

Page 13- Sales by on-reservation, non-Indian retailers to Indians who reside on a reservation

In such an instance, the Indian *purchaser* may be required to pay use tax but only if, within the first 12 months following delivery, the property is used off a reservation more than it is used on a reservation.

3. Sales by Retailers Located on Indian Reservations

Sales by on-reservation Indian retailers to non-Indians and Indians who do not reside on a reservation

This section applies a use tax if the sale is to an Indian or non-Indian that does not reside on the reservation and requires the retailer to both collect the use tax from them and register with the BOE for that purpose. The assertion of use tax violates the right of tribal government to assert exclusive control over retail affairs on the reservation and contributes to the on-going problem of dual taxation on reservation retailers. This is highly unfair to tribes because the tribes, not the state, made the significant investments and accepted the market risks to create a reservation-based retail market. The single-purpose for creating/permitting these establishments was to generate sales tax revenue to fund governmental services (reservation roads, emergency first responders) provided by the tribe to the public who patronize casinos, and/or reside on, the reservation. Unlike state governments, tribal governments do not have a property tax base as a source of revenue because land within the exterior boundaries of a reservation is held in trust for the benefit of the tribe by the federal government. In addition, the high unemployment and lack of a tribal economy and on-reservation jobs make an income tax impossible. Every government recognizes the need of taxation as the main source of funding for services that citizens need. The assertion of a state use tax interferes with the tribal government's right to build a thriving tribal economy and levy a reasonable sales tax to pay for government services. Dual taxation of on-reservation retailers, a use tax by the state and sales tax by the tribe, eliminate all incentive to build an on-reservation tribal economy and result in under-funded tribal government services to the reservation public.

In addition, the duty to register and pay use tax falls on retailers, not the individuals purchasers. The duty to pay should be placed on the purchaser in the same manner as out-of-state purchases. Rather than attempting to assert a use tax in lieu of a sales tax on reservation retailers, BOE should seriously consider the value of initiating discussions with tribes about tribal-state cooperative tax agreements/compacts to constructively address the problems of dual taxation under mutually agreeable terms. Many states have taken this approach: New York, Washington, Oregon and New Mexico, for example.

Tribal Taxes

This Section does not adequately address the problem of dual taxation on reservation commerce for the reasons discussed above.

6. Sales Related to Construction Contracts

Construction contractor as retailer of materials

This section needs to instruct contractors on the proper use of resale certificates within the chain of contract. There needs to be a cross-reference to resale certificates. Prime contractors do not understand the function of resale certifications vis-à-vis subcontractors.

7. Special Taxes and Fees

BOE should explore entering into cooperative tax agreement/compacts or payments in lieu of taxes that recognize the Tribes authority to impose a tax and use the proceeds to fund governmental services or to improve reservation infrastructure. This could also apply to the imposition and collection of fuel, excise and cigarette taxes by the BOE. The Campo Band intends to call a meeting with BOE to seek resolution of these issues and extends an invitation to BOE to more fully explore these issues and establish the framework for an agreement governing such taxation and use of tax revenue.

Sincerely,



Monique LaChappa, Chairwoman
Campo Band of Mission Indians